Filed 8/9/19 State Farm General Ins. Co. v. Watts Regulator Co. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

STATE FARM GENERAL INSURANCE COMPANY, Plaintiff and Respondent, v. WATTS REGULATOR CO., Defendant and Appellant.	H045158 (Santa Cruz County Super. Ct. No. 16CV02224)

Arbitration Forums, Inc. (AF) provides arbitration services to its members. Both plaintiff State Farm General Insurance Company and defendant Watts Regulator Co. are members of AF and signatories to its Property Subrogation Arbitration Agreement (the Agreement). After plaintiff, as subrogee of its insured, filed a product liability complaint, defendant brought a motion to compel arbitration. The trial court denied the motion. On appeal, defendant contends: AF's amendment to the Agreement does not affect claims accruing prior to 2015; and judicial estoppel prevents plaintiff from refusing to arbitrate the claim in the present case. We affirm the order.

I. Factual and Procedural Background

In August 2013, the Agreement required that members "forego litigation and submit any personal, commercial, or self-insured property subrogation claims to" AF. The Agreement contained eight exclusions from the requirement for compulsory arbitration. When the parties became signatories to the Agreement, none of these exclusions applied to the present case.

The Agreement also authorized AF to "make appropriate rules and regulations for the presentation and determination of controversies under this Agreement." The AF rules in effect in 2013 set forth the scope of its own jurisdiction. For example, AF limited its jurisdiction to losses occurring in the United States, Puerto Rico, and the United States Virgin Islands. Jurisdiction was also limited to property damage claims less than $100,000.

Participation in AF is voluntary and members can withdraw from the Agreement at any time. The withdrawal becomes effective 60 days after receipt of written notice "except as to cases then pending before arbitration panels. The effective date of withdrawal as to such pending cases shall be upon final compliance with the finding of the arbitration panels on those cases."

In December 2013, plaintiff notified defendant that the residence of its insureds had sustained water damage allegedly due to the failure of a defective water supply line in August 2013. Plaintiff made payments of $38,901 to its insureds for the damaged property.

In November 2014, AF notified its members by e-bulletin that the Agreement would be amended. It stated: "'No company shall be required, without its written consent, to arbitrate any claim or suit if: (i) it is a product liability claim arising from an alleged defective product.'" (Italics omitted.) Members were also notified that "[w]hile the use of the Property Program to resolve disputes involving product liability claims

arising from an alleged defective product will no longer be compulsory as of January 1, 2015, cases filed prior to January 1, 2015, will remain in arbitration's jurisdiction and will be processed to hearing."

On August 24, 2016, plaintiff filed its complaint against defendant in which it alleged a cause of action for product liability. The claim was not submitted to AF for arbitration before the lawsuit was filed. In October 2016, defendant filed its answer denying the allegations and asserting, among other things, that the complaint was subject to mandatory arbitration and barred by the estoppel doctrine.

In March 2017, defendant filed a motion to compel arbitration and stay proceedings. Defendant argued that arbitration was compulsory under the Agreement and judicial estoppel prevented plaintiff from refusing to arbitrate its claim. Following the trial court's denial of the motion, defendant filed a timely appeal.

II. Discussion

Defendant contends that the claim is subject to mandatory arbitration, because it accrued in August 2013 when both parties were signatories to the Agreement.

"A petition to compel arbitration is simply a suit in equity seeking specific performance of a contract. [Citation.] . . . [¶] When conflicting extrinsic evidence was not offered below, we apply a de novo, or independent, standard of review on appeal from a trial court's determination of whether an arbitration agreement applies to a particular controversy. [Citations.]" (*Aanderud v. Superior Court* (2017) 13 Cal.App.5th 880, 890.) Here, the parties did not introduce conflicting evidence, and thus our review of the trial court's order is de novo.

Under both federal and California law, arbitration, "as a matter of contract between the parties, is a way to resolve *only* those disputes that the parties have agreed to submit to arbitration. [Citation.]" (*Brinkley v. Monterey Financial Services, Inc.* (2015)

242 Cal.App.4th 314, 349.) Thus, we look to the language of the Agreement to determine the parties' intent. (Civ. Code, § 1639.) In examining this language, "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.)

Here, the Agreement provides that "[s]ignatory companies must forego litigation and submit any personal, commercial, or self-insured property subrogation claims to" AF. However, the Agreement contains several exceptions, thus establishing that the parties in the instant case never agreed to arbitrate every subrogation claim. The Agreement also authorized AF to "make appropriate rules and regulations . . . ."

At issue is whether AF's amendment to the Agreement and its rules establish that the duty to arbitrate is triggered by the filing date of a claim or its accrual date. The Agreement provides that a company is bound to arbitrate qualifying disputes when it becomes a signatory to the Agreement, even though all of its causes of action would have accrued before it was a signatory. Moreover, a new signatory is not required to arbitrate a qualifying dispute in which a "lawsuit was instituted prior to, and is pending, at the time the Agreement is signed." The filing date also applies to a company that seeks to withdraw from the Agreement. Withdrawal becomes effective 60 days after written notice to AF, "except as to cases then pending before arbitration panels." In addition, nothing in the Agreement or the rules conditions arbitration on the accrual of a cause of action. Thus, the Agreement and the rules indicate that it is the filing date, not the accrual date, that is critical in determining whether a claim must be submitted to arbitration with AF.

Here, the Agreement was amended to exclude product liability cases filed after January 1, 2015 and AF notified companies that only "cases filed prior to January 1, 2015, [would] remain in arbitration's jurisdiction . . . ." Since plaintiff filed its lawsuit in August 2016, it was not required to submit its claim to arbitration.

Defendant argues that the amendment of the Agreement did not apply retroactively and thus it did not govern claims that accrued prior to the change. Relying on *Nolde Brothers, Inc. v. Bakery & Confectionery Workers Union* (1977) 430 U.S. 243 (*Nolde Brothers*) and *Litton Financial Printing Div. v. NLRB* (1991) 501 U.S. 190, 205-206 (*Litton*), defendant also argues that the United States Supreme Court "imposes a heavy presumption favoring arbitration for disputes that accrue prior to the expiration of the arbitration agreement." Defendant further argues that since the Agreement is susceptible to different interpretations, the presumption of arbitrability applies.

State Farm General Ins. Co. v. Watts Regulator Co. (2017) 17 Cal.App.5th 1093 (*State Farm*) is instructive. In *State Farm*, the parties and the issues were identical to those in the case before us. The plaintiff had filed a complaint in March 2015 and alleged, among other things, a cause of action for product liability against the defendant for a loss that occurred in November 2012. (*Id.* at p. 1097.) The defendant brought a motion to compel arbitration of the Agreement. The defendant argued that it "'never consented or agreed' to the 'retroactive' application of the January 1, 2015 amendment to previously accrued claims." (*Id.* at p. 1100.) The *State Farm* court rejected this retroactivity argument, reasoning that the "notion of retroactivity presupposes that, before January 1, 2015, the date of accrual determined whether a product liability claim was subject to compulsory arbitration. Nothing in the AF arbitration agreement or the AF rules so states, and the withdrawal provision is inconsistent with an interpretation that the accrual date of a claim determines which arbitration agreement applies." (*Ibid.*)[1]

The defendant in *State Farm* also argued that "AF's decision not to offer compulsory arbitration of product liability claims after January 1, 2015, 'meant that the

[1] The *State Farm* court cited AF's reference guide, dated 2009, which includes the language relating to which cases remain in arbitration when a company withdraws from AF. (*State Farm*, *supra*, 17 Cal.App.5th at p. 1100, fn. 2.) The same language is included in AF's reference guide, dated 2012, which was submitted as an exhibit in support of defendant's motion to compel arbitration.

original Arbitration Agreement would expire or be terminated as of that date.'" (*State Farm, supra,* 17 Cal.App.5th at p. 1101.) Relying on *Nolde Brothers, supra,* 430 U.S. 243 and *Litton, supra,* 501 U.S. 190, the defendant contended that the plaintiff "'would still be required to arbitrate claims that arose and accrued' while the original agreement was in effect." (*State Farm,* at p. 1101.) The *State Farm* court distinguished these cases on the ground that the case before it did "not have its source in a contract between the parties. It [did] not involve a collective bargaining agreement, or any other kind of agreement that ha[d] been negotiated between the parties to it and that provide[d] for arbitration of disputes over obligations created by the expired contract. This [was] a subrogation claim arising from a loss suffered by plaintiff's insured—not a dispute arising out of a contractual relationship between plaintiff and defendant. At the risk of repetition, the AF arbitration agreement [was] an industry program offered by a third party that has determined the terms under which it [would] provide arbitration services to companies who agree[d] to bind themselves to the terms set by the third party. There [was] no legal basis for applying rules governing retroactivity, vested rights, or accrual of claims under these circumstances." (*Ibid.*)

The *State Farm* court also found no merit in the defendant's claim that any ambiguity in the Agreement was to be resolved in favor of arbitration. (*State Farm, supra,* 17 Cal.App.5th at p. 1103.) The *State Farm* court reasoned that the parties agreed to arbitration pursuant to the terms and rules set by AF, and since AF clearly intended to stop requiring compulsory arbitration of product liability claims filed after January 1, 2015, the Agreement was not ambiguous. (*Ibid.*)[2]

[2] The case of *Watts Water Techs., Inc. v. State Farm Fire & Cas.* Co. (Ind.Ct.App. 2016) 66 N.E.3d 983 also considered and rejected the arguments advanced by defendant in the present case.

We agree with the reasoning of *State Farm, supra*, 17 Cal.App.5th 1093 and reject defendant's contentions.[3]

Relying on *Huffman v. Hilltop Companies, LLC* (6th Cir. 2014) 747 F.3d 391 (*Huffman*) and *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 (*Sonic*), defendant claims that plaintiff's interpretation of the Agreement grants it "a one-sided ability to avoid its obligation to arbitrate claims accruing before the January 1, 2015 change took effect" and this interpretation is disfavored under federal and California law. *Huffman* and *Sonic* are readily distinguishable from the present case. In *Huffman*, the issue was whether the arbitration clause survived after the employment agreement expired. (*Huffman*, at p. 394.) In *Sonic*, the issue was whether an arbitration provision was unconscionable due to a power imbalance between the contracting parties. (*Sonic*, at pp. 1125, 1145.) Here, plaintiff neither terminated nor played any part in the amendment of the Agreement.

Defendant argues that plaintiff's interpretation of the Agreement allows plaintiff, but not defendant, to "pick and choose the claims it wishes to submit" to AF and that "[o]nce the parties found out in November 2014 about the upcoming change, State Farm could simply wait to litigate any accrued claims that it chose not to submit" under the Agreement. We are not persuaded by this argument. Both parties were given the same

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[3] In addition to *Nolde Brothers, supra*, 430 U.S. 243 and *Litton, supra*, 501 U.S. 190, defendant relies on *Primex Int'l. Corp. v. Wal-Mart Stores, Inc.* (N.Y. 1997) 679 N.E.2d 624, 628, *Goshawk Dedicated Ltd. v. Portsmouth Settlement Co.* (N.D.Ga 2006) 466 F.Supp.2d 1293, 1301, *Liberty University, Inc. v. Kemper Sec. Group, Inc.* (W.D.Va. 1991) 758 F.Supp. 1148, 1152, and *Mendez v. Trustees of Boston University* (1972) 362 Mass. 353, 356, for the proposition that "accrued rights survive modification or termination of a contract, unless both parties specifically agree that the termination or modification would apply retroactively." However, these cases are distinguishable from the present case on the same ground that *Nolde Brothers* and *Litton* are. In those cases, the parties entered into contracts which included arbitration clauses for disputes arising out of those contracts. Here, the parties did not negotiate with each other, but separately signed the Agreement which was drafted by AF. The Agreement also authorized AF to make "rules and regulations for the . . . determination of controversies . . . ."

two months' notice of the amendment by AF, which drafted the Agreement and the amendment. Defendant fails to explain how it was prejudiced by this amendment. Moreover, defendant's argument was also rejected as "fantastical" by the court in *State Farm Fire & Cas. Co. v. Watts Regulator Co.* (Ill.App.Ct. 2016) 63 N.E.3d 304. The court reasoned that such manipulation would require the plaintiff to "divine that Arbitration Forums was going to amend the agreement in a fashion that it deemed favorable to it," an assertion for which there was no evidence. (*Id.* at p. 314.) The court also observed that the plaintiff would always have to be cognizant of the statute of limitations in bringing such claims. (*Ibid.*)

Defendant's reliance on orders by California trial courts as well as those from other jurisdictions, which have ruled that the change to the Agreement in 2015 did not apply to claims that had accrued prior to the change, is misplaced. The California Rules of Court do not permit citation to trial court orders as authority (Cal. Rules of Court, rule 8.1115(a)). (*Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 758, fn. 2.)[4]

In its reply brief and with no citation to authority, defendant asserts that plaintiff's reliance on the November 2014 e-bulletin is "improper because the Agreement is not ambiguous and therefore it is improper to consult extrinsic evidence." We do not consider an issue raised for the first time in a reply brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764-765.) We also note that the *State Farm* court rejected this same argument. (*State Farm*, *supra*, 17 Cal.App.5th at p. 1103.)

Defendant next contends judicial estoppel prevents plaintiff from refusing to arbitrate the claim at issue.

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[4] Plaintiff has also requested that we take judicial notice of California trial court orders and those of other jurisdictions that have taken the opposite position. We deny the request for the same reason. We also deny plaintiff's request to take judicial notice of an AF employee's declaration, which was submitted in another case, as irrelevant.

"'"Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. [Citation.] Application of the doctrine is discretionary."' [Citation.] The doctrine applies when '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.' [Citations.]" (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987.)

Defendant argues that plaintiff has taken a position in the present case which is inconsistent to its position in other cases. Defendant relies, as it did in the trial court, on the case of *State Farm Fire & Casualty Company, as Subrogee of Rickey D. Bingham v. Watts Water Technologies, Ins.* (*Bingham*). The order in that case states: "By consent of Plaintiff State Farm Fire and Casualty Company, a/s/o Rickey D. Bingham and Defendant Watts Water Technologies, Inc.[] ('Watts Water'), the Court holds that the mandatory Arbitration Agreement between State Farm Fire and Casualty Company and Watts Water in effect at the time the claim arose and accrued (i.e., the date of loss in this case—January 20, 2013) governs this claim. Thus, because Plaintiff's claim meets the criteria under this Arbitration Agreement for mandatory arbitration—it is between two signatories and under $100,000—the Court hereby COMPELS this case to binding arbitration under Arbitration Forums, Inc. and the case is non-suited by Plaintiff."

Defendant's argument was rejected by the *State Farm* court. (*State Farm, supra,* 17 Cal.App.5th at p. 1102.) In that case, the defendant, as in the present case, relied on the order in *Bingham*. (*State Farm*, at p. 1102.) The *State Farm* court reasoned: "There is no 'unfair strategy' in consenting to arbitration in one case and not in another. Nor did plaintiff '"'gain[] an advantage'"' by consenting to arbitration in one case and then

‘“‘seek[] a second advantage’”’ by not doing so in another. [Citation.] Moreover, there is no showing plaintiff has taken incompatible positions. The one-page order defendant cites does not show the facts in the Tennessee matter, and plaintiff tells us that this was a claim it had previously filed with AF, *before* January 1, 2015, and then withdrew from arbitration after AF announced the forthcoming change in its rules. (This also happened in a California case where plaintiff stipulated to arbitration with defendant; the stipulation in that case shows the facts to be as plaintiff states.) In short, those cases involved different circumstances—where plaintiff initially submitted the claim to AF before January 1, 2015—so defendant has not shown any inconsistency in plaintiff’s position. In any event, we cannot see why a party’s consent or stipulation to arbitration in one case should estop it from taking a different position in a different matter. The gravamen of judicial estoppel ‘“is the intentional assertion of an inconsistent position that perverts the judicial machinery.”’ [Citation.] Nothing of the sort happened here.” (*Ibid.*)

Similarly, here, plaintiff states that it “had filed arbitrations prior to the rule change that they then withdrew in favor of litigation,” but ultimately agreed to arbitration in other cases. For the reasons stated in *State Farm*, we reject application of the doctrine of judicial estoppel.

In sum, the trial court properly denied defendant’s motion to compel arbitration.

III. Disposition

The order is affirmed.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

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Danner, J.

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